



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212, 225, and 252**

**[Docket DARS-2022-0032]**

**RIN 0750-AL59**

**Defense Federal Acquisition Regulation Supplement: Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region (DFARS Case 2022-D008)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Interim rule.

**SUMMARY:** DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act of Fiscal Year 2022 that prohibits the use of funds to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from the Xinjiang Uyghur Autonomous Region.

**DATES:** *Effective date:* December 30, 2022.

*Comment due date:* Comments on the interim rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2022-D008, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>.

Search for "DFARS Case 2022-D008." Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2022-D008" on any attached document.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2022-D008 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone 703-717-3446.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This interim rule revises the DFARS to implement section 848 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81). Section 848 prohibits the use of funds to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from the Xinjiang Uyghur Autonomous Region of the People's Republic of China (XUAR) and requires a certification from offerors for contracts with DoD stating the offeror has made a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a contract.

**II. Discussion and Analysis**

This interim rule makes the following changes to the DFARS to implement section 848 of the NDAA for FY 2022:

*A. Definitions*

The interim rule adds a new section for definitions in DFARS 225.7022-2. "Forced labor" is defined as all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer themselves voluntarily.

In addition, the rule defines "person" as—

a. A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group; or

b. Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in item a.

Lastly, "XUAR" is added and is defined as the Xinjiang Uyghur Autonomous Region of the People's Republic of China.

*B. Prohibition*

At DFARS 225.7022-3, the statutory prohibition is added that DoD shall not award a contract utilizing funds appropriated or otherwise made available for fiscal year 2022 to an entity that uses forced labor from XUAR.

*C. Certification*

The statute requires a certification from offerors for all DoD contracts stating the offeror has made a good faith effort to determine that forced labor from XUAR was not or will not be

used in the performance of such contract. A solicitation provision is created to facilitate receipt of the good faith certification from offerors. A contract clause is created to provide the associated terms and conditions for compliance, as they will apply to the contract. The solicitation provision and contract clause are added to the list at DFARS 212.301 of clauses and provisions that apply to the acquisition of commercial items.

#### *D. Solicitation Provision and Contract Clause*

A new solicitation provision at 252.225-7059, Prohibition on Certain Procurements From the Xinjiang Uyghur Autonomous Region-Certification, is added for use in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial services, commercial products, or commercially available off-the-shelf (COTS) items. The provision is used in solicitations that contain the clause at 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region. This provision will be used to determine whether the offeror is subject to the statutory prohibition and therefore is prohibited from consideration for contract award. If the offeror responds that it does not certify that it has made a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a contract resulting from the solicitation, then the offeror is ineligible for contract award.

A new contract clause at 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region, is added for use in solicitations and contracts, utilizing funds appropriated or otherwise made available for fiscal year 2022, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial services, commercial products, or COTS items. The new clause prohibits contractors from providing, throughout the period of performance of the contract, any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of any forced labor programs.

#### *E. Exceptions*

The section 848 prohibition will not apply to—

- Purchases under the micro-purchase threshold made using the Governmentwide commercial purchase card; or
- Purchases using the SF 44, Purchase Order-Invoice-Voucher, in accordance with 213.306.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items**

This DFARS rule implements section 848 of the NDAA for FY 2022. Section 848 prohibits the use of funds to knowingly procure any products mined, produced, or manufactured wholly or

in part by forced labor from XUAR and requires a certification from offerors for DoD contracts.

This rule creates a new solicitation provision at DFARS 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region-Certification, and a new contract clause at DFARS 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region. The clause at DFARS 252.225-7060 is prescribed for use in solicitations and contracts utilizing funds appropriated or otherwise made available for fiscal year 2022, including solicitations using FAR part 12 procedures for the acquisition of commercial services and commercial products including COTS items. DoD has made the determination to apply the rule to contracts valued at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial services and commercial products, including COTS items, as defined at FAR 2.101.

*A. Applicability to Contracts at or Below the Simplified Acquisition Threshold*

The statute at 41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. The statute at 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best

interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

*B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products, Including COTS Items.*

The statute at 10 U.S.C. 2375 (redesignated 10 U.S.C. 3452) exempts contracts and subcontracts for the acquisition of commercial services and commercial products (including COTS items) from provisions of law enacted after October 13, 1994, that, as determined by the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), set forth policies, procedures, requirements, or restrictions for the acquisition of property or services unless—

The provision of law—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533a or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b; or
- Specifically refers to 10 U.S.C. 2375 (now 10 U.S.C. 3452) and states that it shall apply to contracts and subcontracts for the acquisition of commercial services and commercial products (including COTS items); or USD (A&S) determines in writing that

it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial products and services from the applicability of the provision. This authority has been delegated to the Principal Director, Defense Pricing and Contracting.

### *C. Determinations*

Section 848 is silent on applicability to contracts and subcontracts in amounts at or below the SAT or for the acquisition of commercial products and commercial services. Also, the statute does not provide for civil or criminal penalties. Therefore, it does not apply to the acquisition of contracts or subcontracts in amounts not greater than the SAT or the acquisition of commercial services and commercial products (including COTS items), unless the Principal Director, Defense Pricing and Contracting, makes a written determination as provided for in 41 U.S.C. 1905 and 10 U.S.C. 2375 (redesignated 10 U.S.C. 3452).

The solicitation provision and contract clause provided are necessary to implement the statutory restrictions and to protect the contracting officer from violating the prohibition on the use of funds to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of a forced labor program.

If the solicitation provision and contract clause are not included in solicitations and contracts valued at or below the



SAT and for the acquisition of commercial services and commercial products (including COTS items) it becomes more likely that a contracting officer could procure a prohibited product, thereby undermining the overarching public policy purpose of the law. Subjecting FAR part 13 simplified acquisitions to section 848 will not impact simplified acquisitions conducted without issuance of a purchase order through the use of the Governmentwide commercial purchase card or the SF 44, as these acquisitions are excepted from section 848.

An exception for contracts for the acquisition of commercial services and commercial products, including COTS items, would exclude some high dollar value contracts, thereby undermining the overarching public policy purpose of the law. However, the prohibition in section 848 covers only "knowingly" procuring covered items. It would be unreasonable to expect the parties to a procurement through the use of the Governmentwide commercial purchase card or the SF 44 to know whether the commercial products or commercial services being procured are mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of a forced labor program.

Based on the findings above, it would not be in the best interest of the United States to exempt acquisitions not greater than the SAT (except for purchases made regardless of dollar

value through the use of the Governmentwide commercial purchase card or the SF 44) and acquisitions of commercial services or commercial products, including COTS items, from the applicability of section 848 of the NDAA for FY 2022.

#### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

#### **V. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the *Federal Register*. The Office of

Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

## **VI. Regulatory Flexibility Act**

This interim rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. An initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is amending the DFARS to implement section 848 of the National Defense Authorization act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81). Section 848 prohibits the use of funds to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from the Xinjiang Uyghur Autonomous Region in the People's Republic of China (XUAR) or from an entity that has used labor from within or transferred from XUAR as part of any forced labor programs. In addition, section 848 requires a certification from offerors for DoD contracts stating the offeror has made a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a contract.

The objective of the rule is to implement the prohibition and certification requirement of section 848. The rule includes a new solicitation provision at DFARS 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Certification, which includes a certification requirement, and a new contract clause at DFARS 252.225-7060, Prohibition on

Certain Procurements from the Xinjiang Uyghur Autonomous Region, which prohibits contractors from providing any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of any forced labor programs. The legal basis for this rule is section 848 of the NDAA for FY 2022.

DoD reviewed data obtained from the Federal Procurement Data System (FPDS) for FY 2020, 2021, and 2022, for DoD purchases of supplies or end products valued above the micro-purchase threshold, including commercial products and COTS items. DoD made an average of 374,735 awards to 16,122 unique entities, of which 154,515 awards were made to 12,187 unique small entities. In addition to the small entities that received awards, DoD estimates there were approximately 621,718 unsuccessful offerors. Note that the unsuccessful offerors are not unique entities; in other words, a single entity may have been counted more than once as an unsuccessful offeror. The rule will apply to successful offerors that receive awards and unsuccessful offerors.

The solicitation provision at DFARS 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Certification, requires offerors to certify that the offeror has made a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a contract resulting from the solicitation containing the

provision. Small entities that sell products to DoD will be subject to this requirement when they submit offers for DoD contracts. The rule does not require any other reporting or recordkeeping.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The section 848 prohibition will not apply to purchases under the micro-purchase threshold made using the Governmentwide commercial purchase card or to purchases using the SF 44, Purchase Order-Invoice-Voucher (see DFARS 213.306). DoD was unable to identify any other alternatives that would reduce burden on small businesses and still meet the objectives of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2022-D008), in correspondence.

## **VII. Paperwork Reduction Act**

This rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control

Number 0750-0007, entitled Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region-Certification.

#### **VIII. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment (41 U.S.C. 1707(d)). This action is necessary because section 848 of the NDAA for FY 2022 adds the prohibition that requires the offeror to provide a certification that it made a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a contract. DoD recognizes that Congress considers this an important public policy to avoid further genocide (see the Joint Explanatory Statement to Accompany the National Defense Authorization Act for Fiscal Year 2022).

Consequently, this interim rule is necessary to ensure implementation of the new statutory certification requirements in section 848. The law containing section 848 was enacted in December 2021, and section 848 is currently in effect.

However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

#### **List of Subjects in 48 CFR Parts 212, 225, and 252**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 212, 225, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 212.301 by adding paragraphs (f) (x) (KK) and (LL) to read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(f) \* \* \*

(x) \* \* \*

(KK) Use the provision at 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Certification, as prescribed in 225.7022-5(a), to comply with section 848 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81).

(LL) Use the clause at 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region, as prescribed in 225.7022-5(b), to comply with section 848 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81).

\* \* \* \* \*

**PART 225—FOREIGN ACQUISITION**

3. Add sections 225.7022, 225.7022-1, 225.7022-2, 225.7022-3, 225.7022-4, and 225.7022-5 to subpart 225.70 to read as follows:

\* \* \* \* \*

Sec.

225.7022 Prohibition on certain procurements from the Xinjiang Uyghur Autonomous Region.

225.7022-1 Scope.

225.7022-2 Definitions.

225.7022-3 Prohibition.

225.7022-4 Exceptions.

225.7022-5 Solicitation provision and contract clause.

\* \* \* \* \*

**225.7022 Prohibition on certain procurements from the Xinjiang Uyghur Autonomous Region.**

**225.7022-1 Scope.**

This section implements section 848 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81).

**225.7022-2 Definitions.**

As used in this section—

*Forced labor* means all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer themselves voluntarily.

*Person* means—



(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group; or

(2) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) of this definition.

XUAR means the Xinjiang Uyghur Autonomous Region of the People's Republic of China.

**225.7022-3 Prohibition.**

Contracting officers shall not award a contract utilizing funds appropriated or otherwise made available for fiscal year 2022 for any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of any forced labor programs, unless an exception applies.

**225.7022-4 Exceptions.**

The prohibition at 225.7022-3 does not apply to-

(a) Purchases under the micro-purchase threshold made using the Governmentwide commercial purchase card; or

(b) Purchases using the SF 44 in accordance with 213.306.

**225.7022-5 Solicitation provision and contract clause.**

(a) Use the provision at 252.225-7059, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Certification, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items and COTS items, that contain the clause at 252.225-7060,

Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region.

(b) Use the clause at 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region, in solicitations, contracts, and orders for products utilizing funds appropriated or otherwise made available for fiscal year 2022, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items and COTS items.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

4. Add sections 252.225-7059 and 252.225-7060 to read as follows:

**252.225-7059 Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Certification.**

As prescribed in 225.7022-5(a), use the following provision:  
PROHIBITION ON CERTAIN PROCUREMENTS FROM THE XINJIANG UYGHUR AUTONOMOUS REGION—CERTIFICATION (DEC 2022)

(a) *Definitions.* *Forced labor, person, and XUAR*, as used in this provision, have the meaning given in the 252.225-7060, Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region, clause of this solicitation.

(b) *Prohibition.* DoD may not knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of any forced labor programs, as specified in paragraph (b) of the 252.225-7060,

Prohibition on certain procurements from the Xinjiang Uyghur Autonomous Region, clause of this solicitation.

(c) *Certification.*

(1) The Offeror does [ ] does not [ ] certify that the Offeror has made a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of a contract resulting from this solicitation.

(2) Offerors who do not certify having made a good faith effort will not be eligible for award.

(End of provision)

**252.225-7060 Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region.**

As prescribed in 225.7022-5(b), use the following clause:

PROHIBITION ON CERTAIN PROCUREMENTS FROM THE XINJIANG UYGHUR AUTONOMOUS REGION (DEC 2022)

(a) *Definitions.* As used in this clause—

*Forced Labor* means all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer themselves voluntarily.

*Person* means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group; or

(2) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) of this definition.

*XUAR* means the Xinjiang Uyghur Autonomous Region of the People's Republic of China.

(b) *Prohibition.* The Contractor shall not provide any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of any forced labor programs throughout the entire period of performance of the contract.

(c) *Subcontracts.* The Contractor shall insert this clause, including this paragraph (c), without alteration other than to identify the appropriate parties, in subcontracts including subcontracts for commercial items and commercially available off-the-shelf items.

(End of clause)